

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

670

BRIEF FOR APPELLANT

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

STANLEY I. LEWIS,
Appellant.

Docket No. 23,047

Appeal From The United States District Court
For The District of Columbia

BENJ. W. DULANY
Attorney for Appellant
(Appointed by this Court.)

United States Court of Appeals
for the District of Columbia Circuit

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ISSUES PRESENTED

1. Did the Court err in restricting cross examination of the complaining witness and prohibiting testimony impeaching her credibility?
2. Should the Court have allowed into evidence a rock which was not shown to be connected with the offense?
3. Did the Court err in admitting photographs which were inflammatory and of little probative value?

This case has not previously been before this Court except upon defendant's motion for summary reversal, filed herein on September 19, 1969. This motion was based on the unavailability of certain Government Exhibits at trial which were subsequently located. Defendant's motion to withdraw the motion for summary reversal was granted by this Court on September 30, 1969.

REFERENCE TO RULINGS: NONE

STATEMENT OF THE CASE

Nature of the Case

This is an appeal in forma pauperis from a judgment of the United States District Court for the District of Columbia dated May 2, 1969, adjudging appellant, Stanley I. Lewis, guilty of the offense of first degree burglary and assault with a dangerous weapon, and committing him to imprisonment for a period of five to fifteen years.

Proceedings Below

By indictment of the Grand Jury filed on October 3, 1968, Stanley I. Lewis was charged with first degree burglary and assault with a dangerous weapon. Following trial by jury on March 6, March 7 and March 10, 1969, and a verdict of guilty on both counts Lewis was sentenced to imprisonment for five to fifteen years. Leave to proceed on appeal without prepayment of costs was granted by the District Court by order dated May 2, 1969.

Statement of Facts

In the early morning hours of August 17, 1968, a man entered the apartment of Marie Christman, the complainant, and assaulted her, hitting her about the head. (Transcript 38-39). After dressing, Mrs. Christman escaped and ran⁽¹⁾ to the home of a friend who called the police. (Transcript, 42, 71).

Subsequently, police officer Ehler arrived at the friend's home and, after talking with Mrs. Christman, called for assistance. Sergeants McConnell and Martin arrived and also talked with Mrs. Christman. They then drove to her apartment, while Officer Ehler stayed with her and called for an ambulance.

Shortly after Sergeants Martin and McConnell arrived at Mrs. Christman's apartment, they saw defendant coming down the steps of the building and arrested him. Defendant testified that at about nine or ten o'clock on the night in question, he spoke to Mrs. Christman and asked her if she had anything to drink. She replied that she didn't, but to come back later on. (Transcript,

(1) Though Mrs. Christman testified that she ran from her assailant, she also testified that at the time of the assault she was recovering from a broken hip and was then limping worse than she was at the time of trial. (Transcript, 61-62).

149). He further testified that sometime after two o'clock he went to Mrs. Christman's apartment, saw that the door was open and the glass broken, went up the steps and called her name but nobody answered, so he started back down the steps, when he was arrested. (Transcript, 151).

After arresting defendant, the officers took him back to the home of Mrs. Christman's friend. Mrs. Christman was coming out of her friend's home at this time and when she got in the vicinity of defendant, she identified him as the person who had attacked her. (Transcript, 110).

Mrs. Christman was then taken to Casualty Hospital where she was treated for a laceration and a bruise on her head. She was x-rayed at this time, but no fractures or bone injuries were discovered. (Transcript, 78, 80).

All three police officers then went back to Mrs. Christman's apartment, which they found to be in a general disarray. (Transcript, 111-112). Officer Martin testified that "at that time," he did not disturb anything. (Transcript, 112). The officers locked the apartment and left it.

About thirty to forty minutes later they came back with Officer Oros who found a rock under the pillow

on Mrs. Christman's bed. (Transcript, 86). Three photographs of the bed and the bedclothing. Government's Exhibits 5, 6 and 7, were taken. All three of these photographs show complainant's bed with large stains which the police officers said were blood, though no tests were taken to verify this opinion. In photographs number 5 and 6, the rock, which was found by Officer Oros under complainant's pillow, appears prominently in the middle of the bed.

After Mrs. Christman was treated at Casualty Hospital, she returned to her apartment with one of the policemen. At this time, two photographs, Government's Exhibits 3 and 4, were taken of her. (Transcript, 46, 49).

After he was released pending trial, defendant had a conversation with Mrs. Christman in which he asked her why she had identified him as her assailant. He and two other witnesses to the conversation testified that Mrs. Christman said she did not know who assaulted her but that she had to put the blame on someone so she identified him. (Transcript, 174-175, 187, 204-205). Mrs. Christman denied that any such conversation took place. (Transcript, 64-65, 68).

When Mrs. Christman was asked on recross examination whether she drank, she stated, "I drink beer,

yes, very seldom." (Transcript 94). However, a half pint whiskey bottle was found in her room the night of the assault. One witness testified that she had seen her drunk the evening before the assault and other witnesses testified that they had seen her drinking on many occasions. (Transcript, 122, 125, 133-134).

SUMMARY OF ARGUMENT

Upon cross examination, the complaining witness testified that she only drank beer occasionally. Defense counsel was denied the opportunity to probe this rather questionable assertion by cross examination or to rebut it by independent testimony. Though testimony given at trial indicated that the complaining witness was drunk the night of the offense, that a half pint whiskey bottle was found in her room and that she drank on frequent occasions, defense counsel was cut off in his attempts to cross examine on the subject of her use of alcohol as well as in his attempts to rebut her assertion that she was a very temperate drinker. The severe limitations imposed by the trial court upon the scope of defense counsel's cross examination wholly denied the opportunity, which should have been granted, of impeachment on this subject. Furthermore, the refusal of the trial court to allow independent evidence as to the complaining witness's use of alcohol denied the defense its right to impeach on subject matter opened up by the complaining witness herself.

A triangular rock of substantial size found in the complaining witness's apartment was introduced

in evidence over objection by defense counsel and was given to the jury to examine, upon the assertion that it was used in the assault. While the inflammatory effect of an object like this cannot be doubted, the relation of this particular rock to the offense remains something of a mystery, since there was virtually no evidence showing that it was used in the assault. The complaining witness was unable to identify the rock and, in fact, was unable to testify as to what, if anything, she was hit with. While there were some small stains on the rock, there was no proof that these were blood. The inflammatory effect of this object was so great that it should not have been admitted on such minimal evidence of its relationship to the offense charged.

Over objection by defense counsel, photographs showing the complaining witness in a bandaged and bruised condition after the offense, and photographs showing her bed with large stains on it which were said, but not proved, to be blood, were introduced in evidence and given to the jury. These photographs did not prove or tend to prove any fact which was not admitted by the defense. Thus, they were of little or no probative value and served only to intensify the highly emotional nature of the offense charged. Furthermore, two of the photographs were inaccurate in significant respects

since, as one police officer testified, the scene which was discovered and the scene disclosed by the photographs were materially different, in that the rock had been moved from under a pillow and placed prominently on the stained bed.

ARGUMENT

I

THE TRIAL COURT IMPROPERLY RESTRICTED CROSS EXAMINATION OF THE COMPLAINING WITNESS AND THE INTRODUCTION OF TESTIMONY IMPEACHING HER CREDIBILITY.

(Transcript 56 - 57; 92-95; 122; 165-166;
190-194; 201-202; 209)

Prior to cross examination of Marie Christman, the complaining witness, counsel for defendant held a conference with the trial judge in chambers in which the witness's habits as to the use of alcohol and the effect on her credibility were discussed. (Transcript, 57). When defense counsel's first question designed to probe this subject was put to her, (whether she was in a beer garden on the night of the offense), the prosecutor requested a bench conference. The trial court immediately closed off a major area of inquiry, namely her reputation as an alcoholic, before any question on the subject had been asked. (Transcript, 56-57). Defense counsel, with the Court's permission, repeated the question as to her presence in the beer garden. She evaded it.

Subsequently, Mrs. Christman was recalled by defense counsel. Prior to continued examination, the

trial court permitted only a very narrow scope of inquiry:

MR. O'BRIEN: Your Honor, I think that the first question I would ask is does she drink alcoholic beverages. She may answer that in the negative.

Then if she answers in the affirmative, I would ask, was she drinking on August 16th.

THE COURT: I will permit those two questions.

MR. O'BRIEN: Thank you, Your Honor.
(Transcript, 93).

When the first question was put to her, Mrs. Christman immediately shot beyond the scope of the question and testified that she was a very light drinker, limiting herself to beer, and that "very seldom". In fact, she went out of her way to create in the minds of the jury the impression that she was almost a teetotaler, never touched a drop of hard liquor and rarely had even a beer. (Transcript, 93-94). Since defense counsel knew that her neighbors would testify that she drank frequently (Transcript, 166, 191, 201), and that she was drunk the night of the offense (Transcript, 184-185), and since a whiskey bottle was found in her bedroom the night of the offense (Transcript, 122), he quite properly wished to examine her further on this significant issue. However, though defense counsel approached the bench and explained the necessity and basis for further examination, he was foreclosed from every line of questioning

except that of whether she had been drinking the night of the offense. Since she had already denied this, all further cross examination on the very issue she had tendered was shut off before it commenced.

During the presentation of defendant's case, Willie Brown, a neighbor of Mrs. Christman, testified that when he first met her she was drinking at his sister's house. (Transcript, 201). The prosecutor requested a bench conference. The trial court then instructed defense counsel not to put on any evidence of Mrs. Christman's frequent drinking. Counsel complied but, before resting his case, proffered that if he had been given the opportunity he would have elicited testimony concerning Mrs. Christman's use of alcohol.

The result of the Court's rulings was that Mrs. Christman was allowed to tell the jury that she was an extremely light drinker, almost an abstainer, and no opportunity was given the defense to contradict this assertion, either by cross examination or by independent testimony. Counsel for appellant respectfully submit that these rulings were improper.

That opportunity to cross examine freely is essential to a fair trial has been so often repeated by our courts and text writers as to need no emphasis here. See, e.g., Lindsey v. United States, 77 U.S. App.

D.C. 1, 133 F.2d 366 (1942); McCormick, Evidence §19 at 40 (1954). It is well recognized that a principal function of cross examination is that of testing the witness's credibility. Quite recently, this Court has stated that certainly defense counsel is entitled to broad latitude in examination of prosecution witnesses to impeach credibility. United States v. Kearney, No. 22,-11 at 6 (D.C. Cir., filed August 15, 1969). Exploratory questioning beyond the strictly relevant issues of the case is one of the traditional means of testing the credibility of a witness. See, e.g., McCormick, Evidence, §29 at 54-55 (1954). Indeed, inquiry into collateral issues on cross examination is repeatedly urged, by those who write on the art of cross examination, as a principal method of displaying to the jury a witness's tendency to distort, exaggerate or lie. See Bodin, Principles of Cross Examination at 58-60 (Practising Law Institute 1946). As Professor Wigmore states:

History has shown, and every day's trials illustrate, that not infrequently it is in minor details alone that the false witness is vulnerable and his exposure is feasible.
3 Wigmore, Evidence §1005 at 670 (3d ed. 1940).

Limitation of defense counsel's questions to those strictly relevant to the main issues cripples the usefulness of this kind of examination, and removes one of the tradi-

tional modes of testing the witness's credibility which is encompassed in the defendant's right to confront, and cross examine, his accusers.

In the present case, defense counsel was shut off from all cross examination of the complaining witness which could have revealed to the jury that her voluntary assertion of temperance was less than the truth. Similarly, no opportunity was given for the introduction of independent testimony on this subject, which the witness herself had volunteered. Were the witness's drinking habits a matter which defense counsel introduced by way of exploration, the denial of cross examination and further testimony would be significant enough, but since it was a subject into which the witness herself rushed at the first hint of an opportunity, it was clearly wrong that the defense be denied all opportunity to probe for the truth of the matter and to rebut.

Examination as to the witness's habitual use of alcohol during the weeks preceding and following the offense was relevant to show the probability that she was intoxicated on the evening of the offense. People v. Salladay, 135 Pac. 508 (Cal. Dist. Ct. App. 1913). Moreover, since the witness herself had tendered the issue and testified that she was a very light drinker, it was open to defense counsel to rebut this assertion

as well as to cross examine on it. See United States v. Lowe, 234 F.2d 918 (3d Cir., cert. denied, 352 U.S. 838 (1956)); Josay v. United States, 77 U.S. App. D.C. 321, 135 F.2d 302 (1943); United States v. Stirone, 166 F. Supp. 490 (E.D. Pa. 1957), aff'd., 262 F.2d 571 (3d Cir. 1958), rev'd. on other grounds, 361 U.S. 212 (1960). As stated by the court in United States v. Stirone, supra at 500,

"[cross examination] . . . extends to any matter opened up by a party whether or not the subject is strictly relevant.

It would almost seem that Mr. Justice Stone was summarizing the present case when he stated, in the Supreme Court's opinion in Alford v. United States, 282 U.S. 687 at 694 (1931):

The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error.

II

THE ADMISSION OF TANGIBLE EVIDENCE NOT SHOWN TO HAVE ANY RELATION TO THE OFFENSE WAS ERROR

(Transcript 55; 86; 121-122; 144; Gov't Exhibit No 9)

Stanley Lewis was convicted of assaulting Marie Christman with a dangerous weapon, a crime which carries a far heavier possible sentence than simple assault. Over objection by defense counsel, a roughly triangular rock found in Mrs Christman's bedroom was admitted in evidence (Government Exhibit number 9) There was nothing connecting this rock with the offense except the single fact that it was found in the bedroom. Mrs. Christman testified that she was hit by "something" but was unable to state what this was. (Transcript, 55) In fact, the rock itself was not even shown to Mrs Christman at trial for identification. There was only testimony by police officers that the rock was found in Mrs. Christman's bedroom and that it had some small stains on it. However, Officer Ehler was unable to determine whether these were blood stains or not. (Transcript, 86). No tests were run on the stains. (Transcript, 121) There were other hard objects in Mrs. Christman's bedroom such as a half pint whiskey bottle (Transcript, 122), and no evidence showed that any one of these objects had any more or less likelihood of being

used as a weapon. Indeed, the fact that Mrs. Christman suffered only lacerations and bruises, with no fractures or injury to bones, tends to show that some object far less destructive than this particular rock was used, if, in fact, any object other than an assailant's fist was used. Despite the dearth of evidence linking Government's Exhibit 3 to the offense, it was admitted in evidence, and passed around from juror to juror, (Transcript, 1--), where its emotional and inflammatory impact was surely not lost.

It is a settled rule that tangible objects should not be admitted in evidence unless there is testimony which links them to the offense. Smith v. United States, 81 U.S. App. D.C. 296, 157 F.2d 705 (1946). As noted by Professor McCormick, objects do not identify themselves. They . . . must first be authenticated by testimony of a witness who testifies to facts showing that the object has some connection with the case which makes it relevant. McCormick, Evidence §170 at 384 (1954).

It is submitted that an object as inherently inflammatory as a large triangular rock should not be passed around to the jury on the supposition that it could have been used to beat an elderly woman about the head unless there is more substantial evidence tending to show this fact than what exists in this case.

III

THE TRIAL COURT ERRED IN
ADMITTING PHOTOGRAPHS WHICH
WERE INFLAMMATORY AND OF
LITTLE PROBATIVE VALUE

(Transcript 3-4; 46-48; 85-86; 112; Gov't Exhibits 3-8)

Over objection by defense counsel, the trial court admitted six photographs in evidence, Government's Exhibits 3 through 8. Numbers 3 and 4 show Marie Christman, bandaged, wearing the dress which was stipulated by defense counsel to be the one she wore at the time of the offense. Numbers 5, 6 and 7 show Mrs. Christman's bed, pillow and bedclothes with large stains said to be blood. Numbers 5 and 6 also show a rock, the alleged assault weapon, conspicuously displayed on the bed. Number 8 shows the street door to the complaining witness's apartment with the glass broken out.

Not one of these photographs proves or aids in the proof of an issue in the case as to which there was any controversy. The prosecutor stated that the reason for the introduction of photographs number 3 and 4 was to corroborate that the dress, Government's Exhibit number 2, was the one worn by the complaining witness. Defense counsel promptly stipulated this point. The Government gave no further reason for introduction of these photographs. Nevertheless, they were admitted. (Transcript 47-48).

There was no question at trial that the complaining witness was assaulted, that the assault was carried out in her bedroom, or that the door to the stairs leading to her apartment was broken open. Thus, the photographs were of little, if any, probative value in the case. They could in reality accomplish but one purpose, and that an improper one, to inflame the jury by forcing on their attention the grisly details of the assault and the injuries sustained by the complaining witness. In these circumstances, the photographs should have been excluded. United States v. Kanovsky, 202 F.2d 721 (7th Cir. 1953); Oxendine v. State, 335 P.2d 940 (Okla. Crim. Ct. App. 1958); Archina v. People, 135 Colo. 8 307 P.2d 1083 (1957).

In Oxendine v. State, supra, the prosecution showed the jury a slide of the victim's body, presumably to illustrate the mortal gunshot wound. However, the defendant had conceded the allegations as to cause of death. Therefore, the court held that it was prejudicial error to admit the photographs, since there, as here, there was no fact in issue as to which the photographs had any probative value. Similarly, in United States v. Kanovsky, supra, photographs showing extensive riot damage were held to have been erroneously admitted, since there was no dispute that serious damage had occurred

and the photographs served only to incite the jurors into the very emotions that were supposed to be omitted from their deliberations.

Added to the inflammatory nature of the photographs is a fact which becomes apparent only through close reading of the transcript: the photographs showing the rock on the bed (Government's Exhibits 5 and 6) were inaccurate. Officer Ehler testified twice that the rock was found under a pillow on the bed. (Transcript, 85, 86). Obviously, it was moved from that location so it would show in the photographs. Significantly, when Officer Martin was asked whether he disturbed the scene the first time he entered the apartment, he said, "No sir, at that time, I did not." (Transcript, 112).

Since there was virtually nothing linking the rock to the offense, the fact that the police rearranged the scene by moving the rock from under the pillow to the center of the bed, where it would show in the photographs, was dangerously misleading and rendered the photographs themselves inadmissible. A prerequisite to the admissibility of a photograph is that it accurately represent the scene as it existed at the time of the incident. Altemus v. Talmadge, 61 App. D.C. 148, 58 F.2d 874, cert. denied, 287 U.S. 614 (1932). These photographs did not represent the scene of the offense,



but, rather, a re-structured scene. This error is particularly significant in this case because the photograph showing the rock as part of the scene could not help but mislead the jury into the fixed idea that the rock was part of the offense. Since there was so little evidence that the rock had anything to do with the offense, it was particularly dangerous that the jury should be subjected to the inaccurate visual impression of Government's Exhibits 5 and 6. These photographs in particular should have been excluded.

CONCLUSION

Upon the foregoing, the judgment of conviction herein should be reversed.

Respectfully submitted,

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